5608. Adulteration and misbranding of apples. U. S. * * * v. Walter B. Wedell. Tried to the court and a jury. Verdict of guilty. Fine, $200. (F. & D. No. 6829. I. S. No. 2543-h.)

On March 13, 1916, the United States attorney for the District of Utah, acting upon a report by the Secretary of Agriculture, filed in the District Court of the United States for said district an information against Walter B. Wedell, Hot Springs, Utah, alleging shipment by said defendant, in violation of the Food and Drugs Act, on or about October 25, 1913, from the State of Utah into the State of Colorado, of a quantity of an article labeled in part, "Gano Extra," which was adulterated and misbranded.

Examination of a sample of the article by the Bureau of Chemistry of this department showed the following results:

Box contained 135 apples, classified as follows:

50 wormy or worm eaten, equivalent to	37 per cent.
6 blemished by insect "stings," equivalent to	4 per cent.
3 blemished by scab, equivalent to	2 per cent.
1 blemished by sun scald, equivalent to	1 per cent.
75 apparently sound and free from defects, equivalent to	56 per cent.

The fruit was defective and filthy on account of ravages of insects, and was not of "extra" grade, as labeled, because of the defects and blemishes.

Adulteration of the articles was alleged in the information for the reason that it consisted in whole or in part of a filthy vegetable substance.

Misbranding of the article was alleged for the reason that the statement appearing on the label regarding the article and the ingredients and substances contained therein, to wit, "Gano Extra," was false and misleading in that it indicated to purchasers thereof that it consisted of apples of gano type or variety, which were of extra or superior quality, and for the further reason that it was labeled as aforesaid so as to deceive and mislead the purchasers into the belief that it consisted of apples of gano type or variety, which were of extra or superior quality, when, in truth and in fact, it did not, but consisted of, to wit, gano apples which were in whole or in part wormy, worm eaten, and otherwise filthy.

On November 22, 1906, the case having come on for trial before the court and a jury, after the submission of evidence and argument by counsel, the following charge was delivered to the jury by the court. (Johnson, D. J.)

Gentlemen of the jury, the defendant, Walter B. Wedell, is charged in this case by the United States on an information filed by the district attorney with the violation of what is commonly called the Food and Drugs Act of Congress. The charge is in two counts, the first of which is, beginning with the charging part, that "Walter B. Wedell, of the city of Hot Springs, State of Utah, did within the Judicial District of Utah, and within the jurisdiction of this court, on or about the 25th day of October, in the year 1913, then and there, in violation of the Act of Congress of June 30, 1906, known as the Food and Drugs Act, unlawfully ship and deliver for shipment from the city of Hot Springs, State of Utah, to the city of Denver, State of Colorado, consigned to W. B. Wedell. for delivery to the Western Fruit and Vegetable Company, a certain consignment, to-wit, 630 boxes containing an article designed and intended to be used as an article of food, to-wit, apples, which were then and there denominated as to the contents thereof and labeled, marked and branded as follows, to-wit: "Gano Extra."

That said article of food, when shipped and delivered for shipment as aforesaid, was then and there adulterated within the meaning of said act of Congress in that it consisted in whole or in part of a filthy vegetable substance; all of

which was and is contrary to the form of statute in such case made and provided and against the peace and dignity of the United States of America.

The second count charges that said article of food when shipped and delivered for shipment as aforesaid, was then and there misbranded in that the following statement regarding the article and the ingredients and substances contained therein appearing on the label aforesaid, to-wit, "Gano Extra," was false and misleading in that it indicated to purchasers thereof that the said article consisted of apples of gano type or variety, which were of extra or superior quality, when, in truth and in fact, the said article did not consist of gano apples of extra or superior quality, but did consist of, to-wit, gano apples which were in whole or in part wormy, worm eaten, and otherwise filthy; and the said article was then and there further misbranded in that it was labeled "Gano Extra," so as to deceive and mislead the purchasers into the belief that the said article consisted of apples of gano type or variety, which were of extra or superior quality, when, in truth and in fact, the said article did not consist of gano apples of extra or superior quality, but did consist of, to-wit, gano apples which were in whole or in part wormy, worm eaten, and otherwise filthy; all of which was and is contrary to the form of statute in such case made and provided and against the peace and dignity of the United States of America.

The statute governing in this case, gentlemen of the jury, insofar as it is material to the issues, reads as follows:

"That the introduction into any State from any other State of any article of food which is adulterated or misbranded, within the meaning of this act, is hereby prohibited, and any person who shall ship or deliver for shipment from any State to any other State any such article so adulterated or misbranded, within the meaning of this act, shall be guilty of a misdemeanor.

"The term 'food' as used herein shall include all articles used for food, drink, confectionery or condiment by man or other animal, whether simple, mixed or compound. That for the purposes of this act an article shall be deemed to be adulterated if it consists in whole or in part of a filthy decomposed vegetable substance."

Under the second count the language of the statute reads as follows:

"That the term 'misbranded' as used herein shall apply to all articles of food or articles which enter into the composition of food, the package or label of which shall bear any statement, design, or device regarding such article which shall be false or misleading in any particular. That for the purposes of this act an article shall also be deemed to be misbranded in the case of food if it be labeled or branded so as to deceive or mislead the purchaser."

Under this statute I charge you, gentlemen of the jury, that a shipment made from Hot Springs in this State to Denver in the State of Colorado, by railroad, would be a shipment in interstate commerce.

You will observe that under this statute and under the two counts in the information the defendant is charged in the first count with a shipment of an article adulterated as defined in the statute. Under this count the matter of labeling is immaterial. The only question that you have for consideration in determining your verdict upon this count is, were the apples, or any part of them, alleged to have been shipped by the defendant, adulterated as defined under the statute, which means, as defined under the statute, did the said apples, or any part of them, consist in whole or in part of a filthy vegetable substance.

There has been evidence offered in the case for the purpose of tending to prove or show that some of the apples contained in these boxes shipped by the defendant were what has been termed "wormy" apples. And it is claimed by the prosecution that wormy apples fall within the definition "as consisting in whole or in part of a filthy vegetable substance." Whether or not these apples shipped by the defendant were wormy, or whether, being wormy, they contained matter filthy and a vegetable substance, is a question of fact, gentlemen of the jury, for you to determine from all of the evidence offered in the case.

The word "filthy" has its ordinary and usual signification. I shall not attempt at this time to define the word by the use of other language. It is a term that is familiar to you and of common use and is used in its ordinary and usual acceptation.

If, upon a consideration of the meaning of the word, you shall find that these apples were wormy and that they were or contained a filthy vegetable substance as a result of being wormy, then, under the definition as given by the

statute, they were adulterated and their shipment was and is prohibited by the terms of the statute in interstate commerce trade.

If you shall find that these apples, or some part of them, consisted in whole or in part of a filthy vegetable substance, then I instruct you, gentlemen of the jury, that the defendant would be guilty upon the first count. If, however, you shall find that they were not or did not consist in whole or in part of a filthy vegetable substance, then I instruct you that your verdict should be, upon that count, not guilty.

The defendant is charged in the second count, as I have already stated to you, with misbranding the boxes of fruit or apples shipped by him, in that they were so labeled or branded as to deceive or mislead the purchaser.

By the words used in the statute "the purchaser" is meant not only the wholesale dealer who might buy the apples or the retail dealer who might purchase them but includes also the ultimate consumer who might purchase them for use.

It is charged in the information that they were misbranded in that they were labeled "Extra Gano" or "Gano Extra," and that they were misbranded in that they were not in fact Gano Extra but an inferior apple. The name or expression "Gano Extra" it is claimed by the prosecution has a distinctive meaning, that it characterizes apples of a certain variety or quality, and it is claimed that these apples shipped by the defendant in this shipment were not of the quality which the name "Extra Gano" designates.

Evidence has been introduced in this case tending to show or to prove this designation, and it is for you to determine, gentlemen of the jury, from all of the evidence in the case what is the distinctive meaning of the language or words "Extra Gano" or "Gano Extra."

It is also claimed by the prosecution that these apples were not of the quality which this name designates, but were of an inferior quality, in that they were wormy or worm-eaten. Now I charge you, gentlemen of the jury, that if the name "Gano Extra" or "Extra Gano" designates an apple which is not wormy, and if you shall find from the evidence that the apples shipped by the defendant in this case were, in whole or in part, wormy apples, then the apples would not, in fact, correspond to the designation, and those words being considered alone, if a purchaser seeing a box of the apples with this label was deceived or misled with respect to their quality, then the defendant would be guilty of misbranding, and if that were all in this case, would be guilty as charged in the second count of the information. But, gentlemen of the jury, it appears in this case that this box of apples shipped by the defendant had upon them brands or labels placed there by certain officers of the State; the language of the statement contained upon these brands or labels reads, as I now remember it: "This fruit has been condemned by the State of Utah and is shipped to be used in the manufacture of by-products."

Now it is claimed by the defendant in this case that notwithstanding the use of the words "Extra Gano," assuming that some of these apples were wormy and were not of the quality which that name designated, that nevertheless by reason of these brands or stamps placed upon the boxes by the State officers, a purchaser would be so informed as not to be deceived or misled with respect to them. Whether that contention is or is not true, gentlemen of the jury, I shall submit to you as a question of fact to be determined in this case by you. For the determination of that particular question you may take into consideration the language used upon this State label or brand, its size, its location on the box, and from all of these facts as they may appear in the evidence before you determine whether or not a purchaser of a box of these goods with this label placed there by the defendant "Extra Gano" and these other labels or brands placed upon the boxes by the officers of the State, would be misled or deceived with respect to what he was buying. If such a purchaser would not be deceived or misled and would reasonably know that notwithstanding the stamp "Extra Gano" that he was not getting "Extra Gano," then I charge you, gentlemen of the jury, that there would be no misbranding in this case and the defendant would not be liable; but if, on the other hand, after a consideration of all the matters to which I have called your attention you shall believe that a purchaser, and by "purchaser" I mean, as I said before, any one who might buy, a person of ordinary and reasonable intelligence, if such a person would be misled and deceived and fairly and reasonably suppose that he was buying "Extra Gano" apples, then the defendant would be guilty as charged in the information.

The question of the intent of the defendant in this action or his motive with respect to this shipment or the labels or stamps placed upon the boxes is immaterial. Under the first count the queston is, were these apples adulterated within the meaning of the statute? Under the second count, were they misbranded within the meaning and language of the statute?

In all the matters concerning which I have instructed you that you must find in this case in order to convict the defendant, I now instruct you that it is necessary that you find each and all of such facts beyond a reasonable doubt.

A reasonable doubt is a doubt based upon reason and which is reasonable in view of all the evidence. It is a fair doubt growing out of the evidence or lack of evidence in the case. It is not a mere imaginary, captious or possible doubt but a fair doubt based upon reason and common sense, and if after an impartial comparison and consideration of all the evidence in the case you can not candidly say that you are satisfied of the defendant's guilt, you have a reasonable doubt, and if such is the condition of your mind after considering all the testimony you should find the defendant not guilty. But if after such impartial comparison and consideration of all the evidence you can truthfully say that you have an abiding conviction to a moral certainty of the defendant's guilt, you have no reasonable doubt. A doubt to justify an acquittal must be such a doubt as would cause a reasonable, prudent, and considerate man to hesitate and pause before acting in the graver and more important affairs of life.

The defendant in this case is presumed to be innocent until he is proven guilty, and this presumption, gentlemen of the jury, accompanies each defendant in a criminal case throughout its entire course and until that presumption is overcome and overthrown by evidence offered in the case.

You are the exclusive judges of the facts proven, of the credibility of the witnesses, of the weight and effect of the evidence and of the inferences to be drawn therefrom, and in determining these matters you are to exercise your best judgment based upon your experience in life as men and your knowledge of the motives which influence persons in their statements.

You have a right to take into consideration the conduct and manner of the witnesses while testifying before you, their intelligence and means of observation, their opportunities to know and capacity to remember and to state the facts to which they testify, their interest or lack of interest, if any has been shown, in the result of the trial, their prejudice or bias, if any has been shown, the state of mind of any witness at the time of the occurrence of the things to which he has testified in so far as the evidence enables you to judge it, and the probability or improbability of the truth of these statements in view of all the other evidence.

You are not bound to believe the testimony of any witness or any number of witnesses. You are to search for the truth, believing only such testimony as carries conviction of its truth to your minds.

If you shall believe that any witness has willfully testified falsely as to any material fact in the case, you are at liberty, but not required, to disregard the whole of the testimony of such witness, except in so far as he may have been corroborated by credible witnesses or credible evidence in the case.

If there is a conflict in the testimony of witnesses then it is your duty to reconcile such conflicts in so far as you can, but it is still for you to determine for yourselves what the ultimate truth of the case is.

It is your duty to consider the evidence all together fairly, impartially and conscientiously. You should arrive at your verdict solely upon the evidence introduced before you upon the trial. You should not consider or be influenced by any evidence offered but not admitted by the court, nor any evidence stricken out by the court or withdrawn by counsel.

When you retire to your jury room you will elect one of your number to act as foreman and when you have agreed upon your verdict your foreman will sign it as such in behalf of all of you.

Forms of verdict will be furnished you, gentlemen of the jury, providing for the acquittal or conviction of the defendant upon each of the counts or both of the counts, as your deliberations may result.

At the request of the district attorney I will say to you, gentlemen of the jury, that it is not necessary for the Government to prove any concrete case of a purchaser being deceived or misled. As I stated to you in my instructions heretofore, a purchaser might be any person, as I explained to you, who might buy these apples.

What is a filthy apple, gentlemen of the jury, is a matter for you to determine from all the evidence in the case of course, from your own common experience; you have the right to take that into consideration as well as what you hear. If you hear something that you know is not true of your own experience you have a right to consider it.

Mr. COOK. I think this suggestion should be made in that connection; the language of the count is "consisting in part of filthy vegetable substance."

The COURT. Oh, yes; the whole apple does not have to be filthy. The language of the statute is, the language of the charge is and my instruction is I think throughout the instructions "in whole or in part."

Mr. COOK. So the whole apple even though wormy does not need to be filthy, if it consists in part of filthy vegetable substances.

The COURT. It would have to contain filthy vegetable substances.

Mr. HENDERSON. The question for this jury to decide is whether a wormy apple is a filthy apple.

The COURT. That is the question for them to decide certainly.

Mr. HENDERSON. It is for this jury to decide that question.

The COURT. That question is submitted to them.

The jury thereupon retired and after due deliberation returned a verdict of guilty. Thereupon the defendant, by his counsel, filed his motions in arrest of judgment and for a new trial and on January 20, 1917, said motions were denied, as will more fully appear from the following decision by the court (Johnson, D. J.):

In this case the defendant was convicted on two counts; the first count involved the question which counsel has discussed as to a filthy substance; the second count involved misbranding.

That these apples were misbranded, as charged in the second count of the indictment, I have not any doubt. The boxes were labeled "Extra Gano," and the proof showed that "Extra Gano" was a term that signified the apples were extra good, and at least were not wormy. As I understood it at the time, the only reason that counsel for the defendant contended that they were not misbranded was that certain other brands or notices were stamped on the boxes. I think the court properly left to the jury whether or not these other brands modified the main brand. The fact is I have some doubt in my own mind whether I should have left that question to the jury at all. Just why these apples were put into boxes that had the name "Extra Gano" on them, or why this brand was put on after they were put in, it is not necessary to discuss. The apples could have been shipped without any brand on the boxes at all, except such as the State put on. But those words were there, and I think the defendant got all under the instructions that he was entitled to, and possibly more.

Now, whether or not the statute is intended to cover wormy apples is a question, of course, that is open to discussion. It is like the construction and scope to be given any other statute—the Mann Act, the Safety Appliance Act, and a great many others. I do know this, that the Supreme Court of the United States has shown by its interpretation of these various acts a very liberal interpretation as to their scope and purpose, and in view of the interpretation of the court of final resort upon statutes of this character I think that this court would be abusing its power to undertake in this jurisdiction to put a narrow construction upon a very useful statute.

However, I should be very glad, indeed, to have counsel review this case in the court of appeals. It is important, of course, to determine whether or not wormy apples can be shipped in interstate commerce. It is important to every grower of fruit and every shipper of it. In this case I am inclined, so far as this court is concerned, to accept the verdict of the jury as final.

Upon each count the motion in arrest of judgment and the motion for a new trial may be denied, and the judgment of the court is that the defendant pay a fine of $100 upon each of the counts upon which he stands convicted.

On the same date an order was entered sentencing the defendant to pay a fine of $200, in conformity with the foregoing decision.

C. F. MARVIN, *Acting Secretary of Agriculture.*